IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-1771

BARBARA LUSTGARTEN, M.D.,
Petitioner,

vs.

FRANK C. BAKER, Administrator, Highland District Hospital; BOARD OF GOVERNORS OF HIGHLAND DISTRICT HOSPITAL; EUGENE A. PYLE, JOHN ABERNATHY, DAVID S. AYRES, M.D., T. J. BELLESON, RICHARD BOWMAN, RICHARD L. GRIFFITH, JAMES GIBBS, WENDELL HAREWOOD, GEORGE HASTINGS, OWEN ROUSH, KENNETH JOHNS, VERGIL KELLEY, R. C. WENRICK, M.D., HEBER WILKIN, GEORGE WILKIN, ERNEST WILLIAMSON, and DAN WOLFER, Members of the Board of Governors of Highland District Hospital,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, FOURTH APPELLATE DISTRICT OF OHIO HIGHLAND COUNTY, OHIO

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II. Whether a state court of appeals denies due process of law to a physician where it holds, in affirming the termination of her hospital staff privileges by the board of a public hospital, that the difference between a personality clash and a serious administrative problem is to be decided by the board and that the courts will not set aside such de-

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cision if the record discloses support by some reliable, although contradicted, evidence where the board proceeding itself lacked due process because (1) notice of the specific details of the charges was not given before the testimony of the witnesses at the hearing, (2) witnesses were permitted to decline to answer questions upon cross-examination, (3) witnesses were permitted to refer to incidents by hospital file number while the accused physician was denied access to those hospital records to even identify the incidents, and (4) biased board members were not excluded from the hearing. 3

III. Whether the board of a public hospital denied due process of law in revoking the staff privileges of a physician, acknowledged as competent and skilled, solely upon the subjective charge by certain others on the staff that they do not get along with her, and particularly where it does so while refusing to allow the charged physician to show that she is being held to a standard of personal relations higher than is met by others, including her accusers, thus imposing an arbitrary and capricious standard. 3

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, FOURTH APPELLATE DISTRICT OF OHIO HIGHLAND COUNTY, OHIO

This petition seeks review of *Lustgarten* v. *Baker*, — Ohio App.2d —, Court of Appeals, Highland County, Ohio, Case No. 334, November 9, 1977, appended hereto, yet unreported. There were no other opinions rendered below.

JURISDICTION

The order sought to be reviewed is dated and was entered by the Court of Appeals, Fourth Appellate District, Highland County, Ohio on December 5, 1977. Timely appeal was taken to the Supreme Court of Ohio, which denied review of the Court of Appeals' decision on March 17, 1978.

No rehearing or extension of time within which to petition for certiorari was sought or granted.

Jurisdiction is conferred upon this Court to review the judgment in question by 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

I. Whether an admittedly competent physician on the staff of a public hospital, who is charged by certain other physicians with bad personal relations, is denied due process of law by action of the hospital board terminating her staff privileges where, over her objection, there is permitted to sit as an active member of the board hearing those charges, to give unsworn testimony to the rest of the board without exposure to cross-examination, and to participate in the closed deliberations of that board (even though ultimately abstaining from the vote), a physician who was among those initiating the charges and who is the only physician on the staff who administers anesthesia other than the charged physician who is a specialist in anesthesiology, and thus would benefit financially from her removal.

II. Whether a state court of appeals denies due process of law to a physician where it holds, in affirming the termination of her hospital staff privileges by the board of a public hospital, that the difference between a personality clash and a serious administrative problem is to be decided by the board and that the courts will not set aside such decision if the record discloses support by some reliable, although contradicted, evidence where the board proceeding itself lacked due process because (1) notice of the specific details of the charges was not given before the testimony of the witnesses at the hearing, (2) witnesses were permitted to decline to answer questions upon cross-examination, (3) witnesses were permitted to refer to incidents by hospital file number while the accused physician was denied access to those hospital records to even identify the incidents, and (4) biased board members were not excluded from the hearing.

III. Whether the board of a public hospital denies due process of law in revoking the staff privileges of a physician, acknowledged as competent and skilled, solely upon the subjective charge by some others on the staff that they do not get along with her, and particularly where it does so while refusing to allow the charged physician to show that she is being held to a standard of personal relations higher than is met by others, including her accusers, thus imposing an arbitrary and capricious standard.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

CONSTITUTION OF THE UNITED STATES:

AMENDMENT XIV

§ 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 513.07, OHIO REVISED CODE:

§ 513.07 Joint township district hospital board.

The boards of township trustees of any two or more contiguous townships, whether or not within the same county, may, by a two-thirds favorable vote of each such board, form themselves into a joint township district hospital board for the purpose of establishing, constructing, and maintaining a joint township district general hospital or other hospital facilities as defined in section 140.01 of the Revised Code, and such townships shall be a part of a joint township hospital district.

Such joint township district hospital board shall organize within thirty days after the favorable vote by the last board of trustees joining itself into the joint township district hospital board. The president of the board of township trustees of the most populous township participating shall give notice of the time and place of organization to each member of the board of township trustees of each township comprising the district. Such notice shall be signed by the president

of the board of township trustees of the most populous township comprising the district, and shall be sent by registered mail to each member of the board of township trustees of the townships affected, at least five days prior to such organization meeting, which meeting shall be held in one of the participating townships. All members of the board of township trustees of the townships so participating shall comprise the joint township district hospital board. Two-thirds of all the township trustees of the townships constituting such district constitutes a quorum. Such members of the boards of township trustees shall, at the organization meeting of such joint township district hospital board, proceed with the election of a president, a secretary, and a treasurer, and such other officers as they deem proper and necessary, and shall transact such other business as properly comes before such board.

In the formation of such a hospital district, such action may be taken by or on behalf of part of a township, by excluding that portion of the township lying within a municipal corporation.

SECTION 2506.01, OHIO REVISED CODE:

§ 2506.01 Appeal from decisions of any agency of any political subdivision.

Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court of the county in which the principal office of the political subdivision is located, as provided in sections 2505.01 to 2505.45, inclusive, of the Revised Code, and as such procedure is modified by sections 2506.01 to 2506.04, inclusive, of the Revised Code.

The appeal provided in sections 2506.01 to 2506.04, inclusive, of the Revised Code is in addition to any other remedy of appeal provided by law.

A "final order, adjudication, or decision" does not include any order from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority and a right to a hearing on such appeal is provided; any order which does not constitute a determination of the rights, duties, privileges, benefits, or legal relationships of a specified person; nor any order issued preliminary to or as a result of a criminal proceeding.

STATEMENT OF THE CASE

This action arises out of a hearing of the Board of Governors of Highland District Hospital, a public hospital in rural southern Ohio.[1] The hearing was held to consider charges levied by certain physicians on the hospital staff against another physician, the Petitioner here. The charges sought removal of Petitioner from the hospital staff.[2] No issue was made of Petitioner's professional

[1] Highland District Hospital is a joint township district hospital established by fourteen townships of Highland County, Ohio under the provisions of Section 513.07 Ohio Revised Code.

[2] The motion of the staff initially sought to cancel Petitioner's privileges as of July 1, 1976. Under the hospital bylaws, however, cumbersome procedures would have dictated automatic termination of Petitioner's privileges before any hearing could be conducted. Petitioner thereupon filed an action for declaratory judgment and injunction in the Common Pleas Court below to determine her due process right to remain on the staff until procedures under the bylaws had been completed and the hearing held. Instead, the court entered an order requiring a due process hearing be held by the Board before July 1, 1976, the scheduled date for termination of Petitioner's privileges, and waiving the time consuming procedures of the hospital bylaws. The court then retained jurisdiction to review the ultimate decision of the Board under that court's statutory appellate jurisdiction

competence, which is undisputed,[3] but her personal relationship with and conduct and attitude toward certain others was criticized.[4]

At the commencement of the hearing, Petitioner objected to Respondent David S. Ayres, M.D. participating as a member of the Board at the hearing on the grounds that he was biased against Petitioner.[5] Dr Ayres was one

under Section 2506.01 Ohio Revised Code. Accordingly, both that action and this appeal bear case number 76 CIV 171 and appear in the record here.

[3] Near the close of the hearing, board member Rogers, who ultimately voted against Petitioner stated to Petitioner: "I think that there has not been a soul that has questioned your ability as a doctor. I think you have been complimented, I think it's been very well established that you are an excellent physician." Transcript of Hearing, p. 663.

The Court of Appeals agreed: "The record is clear on the question of Dr. Lustgarten's competency as a doctor and was hardly questioned by any witness at the hearing." Court of Appeals Opinion, p. 10, Appendix, p. 14a.

[4] The charges made without prior announcement at a staff meeting of May 4, 1976, alleged "continuous conduct engaged in by Dr. Lustgarten since her becoming a member of the medical staff, as follows:

> "Failure to adhere to the ethics of the medical profession. Inability to work with others. Conduct not only toward members of the medical staff, but toward patients and the hospital personnel. Failure of compliance with Hospital By-Laws and Medical Staff By-laws, rules and regulations. Failure of cooperation with hospital personnel; poor relationship with other practitioners, and her general attitude toward patients, the hospital, and the public." Transcript of hearing, pp. 6-7.

[5] The Court of Appeals below concluded that "Appellant objected to the presence of Dr. Ayres on the board on the grounds that he was biased against Appellant." Court of Appeals opinion, p. 4, Appendix p. 8a.

Petitioner's objection was raised thus:

> "PRESIDENT GRIFFITH: Okay. And the second one concerns Dr. David Ayres as membership of the Board.
>
> "MR. McMULLEN [Board Counsel]: Now, it's my understanding as regards to Dr. Ayres, he will not be testifying as

of those on the hospital staff who had initiated the charges against Petitioner and who was most notable among those who had bad personal relations with Petitioner. It was shown to the Board that Dr. Ayres, a general practitioner, was the only physician regularly administering anesthesia at the hospital when Petitioner, a specialist in anesthesiology, was admitted to the staff, and that he was concerned that the organization of an anesthesiology department utilizing Petitioner's special training would restrict his practice in that field.[6]

Dr. Ayres participated throughout the hearing to develop the charges against Petitioner from his position on the Board. Unsworn and unamenable to cross-examination, he spoke, over Petitioner's objection, against her and he participated in the closed deliberations of the Board. Thereupon, without findings or opinion, the Board voted nine

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a witness, but will sit as a Board Member and participate in the full function of this hearing as a Board Member.

"MR. CURREN [Counsel for Petitioner]: For the record, we move the Board to exclude Dr. Ayres from participating in this hearing, since we feel that in the interest of due process, he cannot fairly sit both as an accuser and as a Member of the Board. If he is not permitted to testify as a witness, we feel probably if it were a reverse, he could testify as a witness and not sit as a member of the Board. We do object to this, and we feel that he should voluntarily step down as a member of this Board concerning this one particular question. Nothing else.

"PRESIDENT GRIFFITH: It will be the decision of this chair that Dr. Ayres remain as a member of this Board throughout this hearing.

"MR. CURREN: Note our exceptions." Hearing transcript, p. 5.

[6] This pecuniary interest of Dr. Ayres in Dr. Lustgarten's practice was developed at the hearing and was contained on pages 26-27, 600-601, 616-617 and 532-534 and Exhibit 8 of the hearing transcript which was part of the record before the courts below.

to six against Petitioner, with two members, including Dr. Ayres, abstaining from the vote.

A statutory appeal under § 2506.01, Ohio Revised Code, was taken to the Court of Common Pleas of Highland County, Ohio. The entire transcript of the Board hearing discussed above was before the court. There, Petitioner argued that because of Dr. Ayres' personal animosity for Petitioner and his pecuniary interest in the result, due process was denied Petitioner by Dr. Ayres' participation in the hearing and in the closed deliberations of the Board; that she was denied due process by her inability to cross-examine Dr. Ayres and by inadequate notice of the specific charges and opportunity to defend; and that the reasons for the personal dislike of Petitioner by Dr. Ayres and others on the staff did not constitute valid grounds for Petitioner's ouster.[7] The Respondents did not deny

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[7] Petitioner's argument to the Court of Common Pleas (the only proceeding that court conducted on the merits of the appeal) is contained in the transcription of the November 30, 1976 argument in the record of Case No. 76 CIV 171 below. Petitioner argued in part:

"MR. CURREN: • • •

"Dr. David Ayres, one of the accusers on the medical staff, one of the ones who voted in favor of the charges against Dr. Lustgarten sat as a member of the governing board and as a member, if you will, of the jury, and due process envisions that she be tried or afforded a hearing . . ." [p. 2]

• • •

"• • • the voting and argument was in closed session, which Dr. Ayres participated, and again he was an accuser; but Dr. Ayres did not sit quietly at this hearing, he participated actively, engaged in cross-examination, • • • and I objected to his interrogatories being couched in the form of testimony and on many occasions he in fact testified, and you cannot disregard because of the vote what his influence was.

"Due process required that Dr. Ayres step aside • • •." [p. 3]

"• • • certainly Dr. Ayres did indeed have a substantial pecuniary interest in these proceedings because in effect if Dr. Lustgarten is eliminated, competition is lessened." Citing *Gibson* v. *Berryhill*, 411 U.S. 564 (1973) [pp. 3-4]

"• • • they stated that after making these charges that these

Dr. Ayres' interest or animosity but argued that because he was the only physician on a board of lay people, his influence and expertise were essential to the Board's decision.[8]

The Court of Common Pleas denied Petitioner's motion to make its own findings of fact,[9] rendered no opinion, and entered judgment holding that Dr. Ayres' participation did not deny Petitioner due process, that all elements of due process were provided Petitioner, and that the record supported the Board's decision.[10]

Petitioner appealed to the Court of Appeals, Fourth Appellate District, Highland County, Ohio asserting four assignments of error:

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charges would be fully documented at a later time. I submit to the Court that we raised the issue that there were no specific charges against her, and no further charges — no further documentation or specificity was ever given * * *" [p. 6]

"We do contend that she did not have the opportunity to cross-examine one certain witness against her, and that was Dr. Ayres, and he certainly ended up being a witness against her, and there was no right to cross-examination afforded Dr. Lustgarten with respect to Dr. Ayres." [p. 8]

[8] Respondents' counsel in the Court of Common Pleas argued, as shown in the November 30, 1976 transcript in Case No. 76 CIV 171 below:

"MR. McMULLEN: * * *

"Dr. Ayres did participate in these hearings, or in this particular hearing, and provided valuable insight into technical medical situations which were brought out in the examination of witnesses by Board Members and by Mr. Curren." [p. 15]

"Dr. Ayres was not a prosecutor, but he did provide medical expertise for the benefit of this Board of Governors, all laymen, which otherwise would have had a lot more difficulty in understanding some of the testimony." [p. 16]

[9] Appendix, p. 1a.

[10] Appendix, p. 2a.

"I. The trial court erred in deciding that the participation by Dr. David Ayres on the hospital Board in the hearing which revoked Plaintiff's privileges did not deny Plaintiff due process of law.

"II. The trial court erred in deciding that the proceedings of the Board of Highland District Hospital at the hearing on the revocation of Plaintiff's staff privileges did not violate due process of law with respect to adequate notice of the charges and an opportunity to prepare and present her case.

"III. The trial court erred in deciding that the evidence at the hearing of the Board of Highland District Hospital established grounds for revoking the staff privileges of Plaintiff.

"IV. The trial court erred in affirming the decision of the Board."

The Ohio Court of Appeals affirmed. It held that the participation of Dr. Ayres was not such as to constitute a denial of due process or prejudicial error, interpreting *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), and *Wall* v. *American Optometric Ass'n*, 379 F.Supp. 175 (N.D. Ga.), *aff'd sub nom. Wall* v. *Hardwick*, 419 U.S. 888 (1974), as requiring that all Board members be biased to disqualify the Board. It did not mention *Commonwealth Coatings Corp.* v. *Continental Cas. Co.*, 393 U.S. 145 (1968), particularly its interpretation by the California court in *Wheeler* v. *St. Joseph Hosp.*, 63 Cal.App.3d 369, cited to it. The court refused to infer that Dr. Ayers was seeking Petitioner's work absent evidence of the "extent of" his financial interest, even though he was the only other physician on the hospital staff who practiced in Petioner's field. The court below sanctioned the dual functions of accuser and trier of the charges by citing a statutory pattern in Ohio. Noting that such board decisions are

subject to review by the courts under appellate standards, the court stated and applied review standards permitting only a test for sufficient probative evidence to justify the Board's decision, leaving contested facts for the Board to decide.

Review of the court's decision was sought in the Supreme Court of Ohio on these propositions of law:

> "1. A physician who has been admitted to the staff of a public hospital is entitled to due process of law before such physician's staff privileges can be revoked. When holding a hearing to revoke such staff privileges, the hospital's board of governors must be free from bias or prejudice. Where the record shows that a board member who participated in such a hearing and in the board's deliberations was a competitor of the physician whose privileges were being challenged and had pecuniary interest in the outcome of the hearing, that he was the primary accuser of such physician and an originator of the charges being heard, or that he has an acknowledged personal animosity, hostility, bias or ill will toward such physician, the board so constituted is constitutionally disqualified from revoking the physician's privileges.
>
> "2. In a hearing by the Board of a public hospital to revoke the medical staff privileges of a physician, due process is denied by proceedings which deny the physician (1) reasonable notice prior to the hearing of the incidents which are claimed to support the charges, (2) opportunity for the physician, after notice of the details of the charges, to prepare a defense and to know the identity of persons who are to testify, (3) opportunity to cross-examine witnesses, who were permitted to selectively refuse to answer questions, (4) access to the records of the hospital cases which were referred to in testimony by case number only, and (5) the attendance of all of the members of the Board who voted against the physician.

> "3. A public hospital cannot revoke the staff privileges of a physician acknowledged as exceptionally competent and skilled, solely upon the subjective claim that others on the staff do not get along with her or that she is one of those who do not get along with her accusers, and by holding the charged physician to a standard of personal relations higher than is met by others, including her accusers, imposing an arbitrary and capricious standard which denies the accused physician due process of law."

On March 17, 1978 the Supreme Court of Ohio declined review[11] but extended a stay imposed by the lower courts on the Board's action until May 10, 1978.

On May 9, 1978, Justice Potter Stewart, upon application of Petitioner (No. A-945), continued the stay pending disposition in this Court.

REASONS TO ALLOW WRIT

Any event which deprives a large segment of a rural community of the services of a physician is of some public significance, particularly where the professional competence and clinical skill of that physician are unquestioned. Where that event is a decision of a state appellate court approving a judicial act by a public hospital made under the influence of another physician whose personal animosities and financial interests are at stake, the matter is of judicial importance also. Where the state court's decision conflicts with principles of due process of law set forth in applicable decisions of this Court, such decision should be considered for review on certiorari.

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[11] Appendix, p. 20a.

Accordingly, it is submitted that the decision of this Court in *Gibson* v. *Berryhill,* 411 U.S. 564 (1973), the decision of the district court in *Wall* v. *American Optometric Ass'n,* 379 F.Supp. 175 (N.D.Ga.), aff'd by this Court *sub nom. Wall* v. *Hardwick,* 419 U.S. 888 (1974), the decision of this Court in *Commonwealth Coatings Corp.* v. *Continental Cas. Co.,* 393 U.S. 145 (1968) and its application by the California court in *Wheeler* v. *St. Joseph Hosp.,* 63 Cal.App.3d 369, and this Court's decision in *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill,* 281 U.S. 673 (1930) have been disregarded by the court below, and that due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States has been denied Petitioner, Barbara Lustgarten.

This Court has not directly decided the manner in which due process of law requires the board of a public hospital to provide a fair hearing when it acts to remove a physician from its staff. Nor has this Court declared that the board of a public hospital could ever, whether through a fair hearing process or otherwise, remove one physician from its staff because another asserts that there is an irreconcilable personality conflict between him and the charged physician.

In this Court's opinion in *Gibson* v. *Berryhill,* 411 U.S. 564 (1973) and in the decision of the district court in *Wall* v. *American Optometric Ass'n,* 379 F.Supp. 175 (N.D.Ga.), *aff'd sub nom. Wall* v. *Hardwick,* 419 U.S. 888 (1974), it was held that a public licensing board whose members were restricted to members of a professional association was constitutionally disqualified from revoking licenses of optometrists who were not members of that association because the board members had a likely pecuniary interest in the outcome. In the present case, Petitioner objected and moved for the exclusion of one

of seventeen members of the Board which was providing her with a hearing on charges to revoke her hospital privileges: she objected to one of her principal accusers, Dr. David S. Ayres, M.D., sitting on the Board. Dr. Ayres, a general practitioner, was the only physician on the staff of the hospital who regularly administered anesthesia at the time that the Petitioner, a specialist in anesthesiology, was admitted to the staff.[12] The pecuniary interest of Dr. Ayres in the outcome of the matter was far less remote than in either *Gibson* or *Wall.*[13]

The court below sought to distinguish *Gibson* and *Wall* on the ground that, after participating in the hearing and the closed deliberations of the Board, Dr. Ayres abstained from the vote, which was nine to six against Petitioner, with two abstentions. Dr. Ayres had not announced his abstention until he had contributed his full influence to the hearing process and the deliberations and decisions of the other members of the Board and after nine of the seventeen members had committed their votes against Petitioner. Cited to the court below was this Court's holding in *Commonwealth Coatings Corp.* v. *Continental Cas. Co.,* 393 U.S. 145 (1968) and a decision of a California court interpreting that case, *Wheeler* v. *St. Joseph Hosp.,* 63 Cal. App.3d 369. In both of these cases, a unanimous decision of an arbitration panel was reversed on the grounds of a conflict of interest of one member of the panel whose vote

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[12] At some time prior to the hearing, Dr. McKown, a dentist, began administering anesthesia in certain cases.

[13] "[W]e think it impossible to characterize the benefit, as the defendants have, as 'remote and speculative.' Plaintiffs have thousands of patients. Those patients would go somewhere, and there is a substantial likelihood that many of them would go to the defendants with their patronage. In such a situation, we find it inconceivable that the defendants could be called disinterested in the outcome." *Wall* v. *American Optometric Ass'n,* 379 F.Supp. at 188-89.

was not decisive in the outcome. In the *Commonwealth* case, this Court set aside the panel's decision solely because one member of the panel failed to disclose certain business dealings with one of the parties, even though there was no contention that he had any actual bias or was influenced by that relationship. The California court's decision in *Wheeler* is even closer in its facts to the instant case. There, the biased member of the panel was the sole physician on a panel which voted unanimously against the party whose rights were being heard. The California court there held that the influence on the remainder of the panel by the biased physician could not be ignored. In the present case, it has been admitted by Respondents' counsel that Dr. Ayres, the sole physician on the hearing panel, exerted influence on the Board (see footnote 8 *supra*).

The court below justified the combined function of Dr. Ayres as judge, jury and prosecutor by citing Ohio statutes authorizing this in similar administrative proceedings (Court of Appeals opinion, pp. 4-5, App. p. 9a). But the court added that judicial review was provided in such cases. As applied here, however, that review is meaningless, for upon review the court finds itself bound to accept findings of fact of the biased tribunal in the face of conflicting evidence.

> "Petty personality conflicts are not to be magnified out of proportion but whether a problem is a personality clash or serious administrative difficulty, is to be decided by the Board and if the Board finds it necessary to act, the courts will not set aside that decision if the record discloses it is supported by reliable evidence." Court of Appeals opinion, pp. 11-12, App., p. 16a.

State appellate courts can by their decisions deny due process of law to a litigant by closing the door to the possibility

of any fair hearing. It is submitted that this is the thrust of *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U.S. 673 (1930). The court in fact carries its reliance on board discretion to the extreme. It cited the matter of Dr. Lustgarten's residence in the hospital after her house burned down. The court noted that Dr. Lustgarten presented evidence to the Board to justify this. The court did not mention that that evidence was that the Board had voted (over the dissent of Dr. Ayres) to provide her with residence in an unused portion of the hospital in exchange for her twenty-four hour a day coverage of the emergency room.

Furthermore, the entire concept of depriving a physician of the right to continue practice in a public hospital solely on the basis of personal relations with another physician is a question which this Court should consider. There has been no question at all in this case regarding the professional competency and the clinical skill of the Petitioner here. Accordingly, this Court's recent decision in *Board of Curators of the University of Missouri* v. *Horowitz*, —— U.S. ——, 55 L.Ed.2d 124 (1978) can have no impact. Highland District Hospital is a publicly owned facility in a rural area miles from other hospitals. Petitioner, as a member of the staff, has an established practice in obstetrics and anesthesiology, both which require access to hospital facilities. Ohio recognizes that practitioners have a property right in being on the staff of a hospital. *Davidson* v. *Youngstown Hosp. Ass'n*, 19 Ohio App.2d 246 (1969). It is submitted that allowing an action to be taken to remove a physician for grounds of personal relations applies a subjective test which could be as easily employed by Petitioner against Dr. Ayres, for example, had it been Petitioner who was the better politically situated. Such a standard is contrary to due process of law in that it is subjective, arbitrary, unreasonable and capricious.

Public health care facilities such as hospitals are not the private domains of politically connected factions of physicians or instruments of a few to monopolize practice in a particular community. Highland District Hospital serves fourteen Ohio townships. The decision below sanctions this conduct for a large section of the state of Ohio and serves as a precedent for other physicians inclined as Dr. Ayres to take advantage of their influence for their financial gain. Accordingly, it is submitted that the present case is a case of significant public interest and one which this Court should decide.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE COURT OF COMMON PLEAS OF
HIGHLAND COUNTY, OHIO

NO. 76 CIV. 171

BARBARA LUSTGARTEN, M.D.,
Plaintiff,

vs.

FRANK C. BAKER, ADMINISTRATOR, ET AL.,
Defendants.

JUDGMENT ENTRY

(Filed December 22, 1976)

This matter having come on for hearing on Plaintiff's appeal from the decision and order of the Board of Governors of the Highland District Hospital made June 30, 1976, the arguments of counsel and the evidence, and upon due consideration the Court finds that the presence of Dr. David Ayres on the Board of Governors during the hearing previously ordered by the Court did not violate the plaintiff's right to due process; that the plaintiff's right to procedural and substantive due process was in all respects observed and protected by the defendants; and, that the

record of said hearing provides ample evidence to support the decision of the Board of Governors of said hospital.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that plaintiff's Appeal be and the same is hereby denied and that the previous order of August 31, 1976, staying action of the Board of Governors of said Hospital be and the same hereby is dissolved.

Costs of this action shall be paid by the plaintiff.

ENTER:

/s/ JOHN C. BACON
Judge, By Assignment.

IN THE COURT OF COMMON PLEAS OF HIGHLAND COUNTY, OHIO

Case No. 76 CIV 171

BARBARA LUSTGARTEN, M.D.,
Plaintiff,

vs.

FRANK C. BAKER, ADMINISTRATOR, BOARD OF GOVERNORS, HIGHLAND DISTRICT HOSPITAL, ET AL.,
Defendants.

JUDGMENT ENTRY

(Filed January 12, 1977)

This day this cause came on to be heard upon the motion heretofore filed herein for stay of execution of the judgment and order of this Court made and entered on the 22nd day of December, 1976.

Upon consideration of the record and arguments of counsel the Court finds that said motion is not well taken and ought to be and the same is hereby overruled.

Further, upon suggestion of counsel for the Defendants, and it appearing to the Court that the motion heretofore filed herein for findings under Civil Rule 52 had not been acted upon by the Court, the Court now finds that said motion is not well taken and the same is hereby overruled.

ENTER THIS 11th day of January, 1977.

JUDGE
BY ASSIGNMENT

APPROVED:

CONRAD A. CURREN
ATTORNEY FOR PLAINTIFF

JOSEPH JORDAN
ATTORNEY FOR PLAINTIFF

FREDERICK J. BUCKLEY
ATTORNEY FOR DEFENDANTS

COURT OF APPEALS, HIGHLAND COUNTY, OHIO

No. 334

BARBARA LUSTGARTEN, M.D.,
Plaintiff-Appellant,

vs.

FRANK C. BAKER, ADMINISTRATOR, ET AL.,
Defendant-Appellee.

OPINION

(Filed November 9, 1977)

COUNSEL FOR APPELLANT:

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Joseph R. Jordan & Robert E. Manley, 4500 Carew Tower, Cincinnati, Ohio 45202

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Buckley & Miller, Frederick J. Buckley, 145 North South Street, Box 311, Wilmington, Ohio 45177

GREY, J.:

This is an appeal from the Highland County Court of Common Pleas. The facts in the case are as follows: Appellant, Dr. Barbara Lustgarten, was admitted to practice as a physician at the Highland District Hospital. At a medical staff meeting a recommendation was made that Dr. Lustgarten's staff privileges not be renewed for the year July 1, 1976 to June 30, 1977. Lustgarten then brought an action in the Highland County Court of Common Pleas. That court ordered that the Board of Governors of the Highland District Hospital conduct a hearing according to the rules of due process regarding Lustgarten's denial of staff privileges. A hearing was conducted over a period of several days wherein witnesses were heard both for and against Dr. Lustgarten. At the conclusion of the hearing the Board met to consider Dr. Lustgarten's case and voted 9 to 6 not to grant Dr. Lustgarten re-appointment to the hospital. From that administrative decision an appeal was taken to the Common Pleas Court. The Common Pleas Court upheld the decision of the Board of Governors and it is from the decision of that court that this appeal was taken.

The record in this case is voluminous and the briefs of counsel are quite lengthy. Each side has thoroughly researched relevant law. From a reading of the briefs of the Appellant and the Appellee we find that there are certain rules of law applicable to this case upon which there is no dispute. We now set out those principles.

A Doctor has no constitutional right to practice medicine in a public hospital. *Hayman* v. *Galveston*, 273 U.S. 414, 47 S.Ct. 363 (1927). Once having been admitted to the staff of a hospital a physician has a protected right in maintaining that status and such status may not be revoked arbitrarily or capriciously. *Foster* v. *Mobile County Hospital*, 398 F.2d 227 (5th Cir. 1968); *Sams* v. *Ohio Valley General Hospital*, 413 F.2d 826 (4th Cir. 1969).

The physician is entitled to due process of law. *Klinge* v. *Lutheran Charities Assoc. of St. Louis*, 523 F.2d 56 (8th Cir. 1975). Due process means that a physician is entitled to reasonable notice of the charges against him and a reasonable opportunity to defend against those charges. *Christhilf* v. *Annapolis Emergency Hosp. Association*, 496 F.2d 174 (4th Cir. 1974). The doctor has the right to present witnesses and other evidence to rebut those charges and the administrative panel, in deciding those issues, must be free of bias or prejudice. *Gibson* v. *Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.ed 2d 488 (1973); *Wall* v. *American Optometric Association*, 379 F.2d 175 (Ga. 1974) affd. 418 U.S. 888. Due process, however, does not require a full blown judicial trial. *Duffield* v. *Charleston Area Medical Center, Inc.*, 503 F.2d 512 (4th Cir. 1974); *Christhilf* v. *Anapolis Emergency Hospital Assoc.*, supra.

With these general rules in mind we now turn to Appellant's Assignments of Error to determine if the trial court erred in upholding the decision of the Board. The standard to be applied by the Common Pleas Court in reviewing the decisions of Administrative Boards is set out in *Andrews* v. *Board of Liquor Control*, 164 Ohio St. 275 (1955) which holds that the court must appraise all evidence offered at the hearing and such other evidence as it may admit. It is not a trial de novo but, the reviewing court must look into the probative value of the evidence, the credibility of the witnesses, and the weight to be given the various items of evidence. Finally, a reviewing court must decide whether the decision of the agency is supported by reliable, substantive and probative evidence. *Cincinnati Bell, Inc.* v. *Glendale*, 42 Ohio St.2d 368 (1975). The standard of the Appellate Court in reviewing the

decision of the Common Pleas Court is set out in *119.12* O.R.C. See also *Quinn* v. *Board of Real Estate Examiners*, 104 O.App. 316 (1956).

Assignment of Error No. 1 is as follows:

> *"The trial court erred in deciding that the participation by Dr. David Ayres on the hospital board in the hearing which revoked Plaintiff's privileges did not deny Plaintiff due process of law."*

Dr. David Ayres is a doctor practicing at the Highland District Hospital. He is also a member of the Hospital Board of Governors. Appellant objected to the presence of Dr. Ayres on the Board on the grounds that he was biased against the Appellant. The Board overruled that objection and permitted Dr. Ayres to sit at the hearing. Dr. Ayres did not participate in the vote taken by the Board although he did participate in its deliberations. Appellant also argued before the Common Pleas Court that since both Dr. Lustgarten and Dr. Ayres were the two physicians who did most of the anesthesia work at Highland District Hospital, Dr. Ayres had a direct financial interest in the outcome of the Board's decision. It might have been better had Dr. Ayres not participated and he himself apparently felt this possible conflict of interest as evidenced by his declining to vote. We do not feel, however, that his participation was such as to constitute a denial of due process and/or prejudicial error.

Appellant relies on *Gibson* v. *Berryhill*, supra and *Wall* v. *American Optometric Association*, supra, but these cases are distinguishable. In both cases the entire administrative hearing panel are made up of members whose interests were hostile to the entire class of persons subject to the Board's inquiry. In this case Dr. Ayres was only one of

16 members of the Board of Governors and the vote against Dr. Lustgarten was 9 to 6. Appellant argues that Dr. Ayres presence on the Board permitted him to be in a position to affect the Board as a member in its deliberations. Essentially, Appellant's argument is that Dr. Ayres was both the accuser and a member of the Board hearing the matter. We note that many administrative panels may initiate investigations and charges and rule on those very charges. Cf. *Board of Liquor Control* 4301.27 O.R.C.; *Pharmacists* 4729.26, 16 & 17; *Nurses* 4723.28. Indeed a hospital Board of Governors under *513.16 O.R.C.* is authorized to remove its own members, being prosecutor, judge and jury of itself. Each of these decision making bodies, however, are subject to review by the courts under the standards of *Anderson*, supra and *O.R.C. 119.12*. A person at an adjudicatory administrative hearing is entitled to due process but is not entitled to a full scale judicial trial. *Duffield* v. *Charleston Area Medical Center, Inc.*, 361 F.Supp. 298, affd. 503 F.2d 512 (1974). We do not find the presence of Dr. Ayres on the panel as prejudicial.

Appellant also argues in her brief that Dr. Ayres had a financial interest in the outcome of the hearing. We note that at the hearing itself Dr. Ayres presence on the Board was objected to as follows:

> *"MR. CURREN: For the record, we move the Board to exclude Dr. Ayres from participating in this hearing, since we feel that in the interest of due process, he cannot fairly sit both as an accuser and as a Member of the Board. If he is not permitted to testify as a witness, we feel probably if it were a reverse, he could testify as a witness and not sit as a member of the Board. We do object to this, and we feel that he should voluntarily step down as a member of this Board concerning this one particular question. Nothing else. (Emphasis supplied.)*

Only on argument before the Common Pleas Court was the issue of Dr. Ayres financial interest raised for the first time. No evidence was introduced at the hearing or before the Court of Common Pleas to indicate the extent of Dr. Ayres financial interest other than both he and Dr. Lustgarten did anesthesia work. We would therefore have to infer that Dr. Ayres was seeking this kind of work and would have the time to do it. This argument is the classic inference based on an inference and cannot hold water. From the foregoing we find plaintiff's first assignment of error is not well taken.

Plaintiff's second assignment of error is as follows:

> *"The trial court erred in deciding that the proceedings of the Board of Highland District Hospital at the hearing on the revocation of plaintiff's staff privileges did not violate due process of law with respect to adequate notice of the charges and an opportunity to prepare and present her case."*

Appellant's second assignment of error is a claim of the denial of due process and is treated in Appellant's brief as four separate items. One is the lack of reasonable notice of the charges, the second is adequacy of time to prepare cases, and the third is the right to cross-examine witnesses and the fourth is Appellant's access to hospital records. In order to examine these four items it is necessary to briefly review the proceedings. On May 4, 1976 at a medical staff meeting Dr. Lustgarten's colleagues voted 8 to 4 against her reappointment to the Highland County Staff, effective July 1, 1976. In the normal course of hospital routine this recommendation would have been presented to the Executive Committee of the medical staff and then to the Board of Governors. The Hospital By-laws, particularly Article 5, Section 3, dealt with the reappointment process. Article 8 of the By-laws dealt with the hearing

and review procedures which related to notice, counsel and other due process requirements. It should be noted that on June 7, 1976 the Executive Committee of the Medical Staff considered the matter and found that the charges against Dr. Lustgarten were broad and generalized and without specific instances to support the charges. Prior to this, however, on May 17, 1976 Dr. Lustgarten filed a Complaint in the Common Pleas Court seeking a preliminary injunction and restraining order against the Administrator and Board of Governors of the Highland District Hospital. The restraining order was granted prohibiting the Administrator and the Board of Governors from taking any action upon the recommendation of the medical staff. On May 26, the court removed the prior restraining order and granted a preliminary mandatory injunction ordering the Board of Governors to conduct a due process hearing and to render a decision on Dr. Lustgarten's appointment on or before July 1st. The court also permitted the Board of Governors to hear and receive the recommendations of the medical staff and the executive committee of the medical staff.

Dr. Lustgarten prevailed in obtaining the relief she sought. We think it is significant that in a request for hearing before the Board of Governors Dr. Lustgarten did not seek a remedy in the nature of a Bill of Particulars nor was there any request that there be any specifications or charges. Dr. Lustgarten sought, in her complaint:

> *"• • • • an adjudication of the rights and status of the Plaintiff under the by-laws of the Medical Staff of the Highland District Hospital • • • •"*

She also specifically sought an injunction to prevent the Board from taking any action on the recommendation of May 4. The Medical Staff and Hospital By-Laws would

have been provided for specific notice of any charges. Appellant's action sought to by-pass this procedure and to have her status determined by the Board of Governors, after an inquiry by them. Such a hearing would constitute a general inquiry into the subject matter of Dr. Lustgarten's status. Having sought such relief and having prevailed, Appellant cannot now claim that she was without adequate notice. The hearing was for the purpose of determining her status and for consideration of a renewal of her staff privileges. Appellant obtained the relief she sought. If the order of the trial court was overly broad, if Appellant was unaware as to the nature and extent of the matters to be considered at the hearing, she had an adequate remedy at that time in the trial court.

Appellant also argues that there was not adequate time in which to prepare a defense. Appellant's position is this: Having sought to have the matter brought before the Board of Governors as soon as possible, she now claims on appeal that she was without adequate time to prepare her defense. No request for a continuance was made before the Court or before the Board. Any failure of the Board to grant additional time was the result of Appellant's insistence on an immediate hearing, and if it is error it is invited error.

The third item raised in Appellant's brief regarding the right to due process is the right to cross-examine adverse witnesses. Appellant argues in her brief that the right of a witness to refuse to answer a question made a "sham" of Appellant's right to cross-examine. In *56 O.Jur.2d, Witnesses, Sec. 24*, we have the following language:

> "• • • *in Ohio it is held that a witness, as well as a party, may object to the relevancy of competency of the evidence sought to be extracted from him, and may rightfully refuse to answer where the questions*

> *are not pertinent to the matter* • • •. *However, a witness cannot be allowed to determine by himself whether a question is relevant or irrelevant, since such a determination rests with the court.*"

The Board of Governors, acting as the trier of facts in this case, permitted witnesses to decline to answer questions if they preferred not to and the Board did not compel any witness to answer any question which he declined. Appellant further objects to the admission of hearsay evidence which was admitted at the Board hearing. There is no requirement that an administrative panel must follow the Rules of Evidence. *Duffield,* supra and *Christhilf,* supra. It should be noted that the Board of Governors is a creature of statute and that its members are laymen and not jurists or lawyers. In the world of laymen hearsay is a common source of knowledge and information. It is commonly accepted to be less credible than testimony from personal knowledge but is nontheless ordinarily relied on by the average person.

The exclusionary rules of evidence and the underlying reasons for them are the result of centuries of legal experience and scholarship. To a person trained in the law they seem reasonable and proper. One would not expect laymen to understand them or the reasons for their existence nor would one expect laymen to attempt to arrive at the truth of any matter by limiting the scope of their inquiry. Since the statute created the Board of Governors to be composed of ordinary persons it must be presumed that the legislature intended that in their decision making capacity the Board shall operate the procedures followed by ordinary persons. The Board was genuinely interested in getting at the truth and admitted all sorts of evidence, including hearsay, from both sides. The Board subpoenaed no witnesses but permitted any interested person

to come and tell his story. Under the rules of evidence such a procedure might be questioned, but a reading of the entire transcript indicates that the Board met acceptible standards to insure due process to both sides of the dispute.

The fourth item claims that Appellant was denied due process because she was denied access to hospital records. It is clear that the decision of the Board of Governors was based on factors other than Dr. Lustgarten's medical competency and we fail to see how access to medical records would have established any matter other than Dr. Lustgarten's competency. The record is clear on the question of Dr. Lustgarten's competency as a doctor and was hardly questioned by any witness at the hearing. We fail to see, nor does Appellant attempt to offer, what facts might have been established had Appellant been given access to these privileged records. The cases cited in Appellant's brief are distinguishable. Those cases dealt with such questions as unjustified surgery. Access to hospital records would be relevant and necessary to rebut matters raised. In this case there was no issue as to medical procedures.

Based on the foregoing we find the Second Assignment of Error is not well taken and the same is overruled.

Appellant's Third Assignment of Error is as follows:

> *"The trial court erred in deciding that the evidence at the hearing of the Board of Highland District Hospital established grounds for revoking the staff privileges of Plaintiff."*

Essentially, this is a claim that the decision of the Board is against the weight of the evidence. The rule to be applied in examining decisions of administrative hearings is whether the record demonstrates if there is sufficient, substantive, reliable and probative evidence to justify the decision of the Board. *Andrews* v. *Board of Liquor Con-*

trol, supra. We would like to apply that standard in the instant case.

We begin by noting that a modern hospital is staffed by many highly trained professionals. A well-functioning hospital is made up not only of doctors but many sub-specialists, including medical technologists, surgical nurses, physical therapists, inhalation therapists. There is probably no civilian occupation where subordinates are required to so exactly obey, to so unquestionably adhere to the dictates of their superiors, as medical staff personnel are required to obey doctors, but they are not minions and lackeys. These persons are qualified professionals, specially licensed within their limited sub-specialties and are entitled to be treated with respect. The record shows that the Appellant engaged in, among other things, racial slurs against a fellow doctor, badgering and berating behavior towards members of the hospital staff other than doctors, and abusive conduct in general. It should be remembered that the management of the hospital is given to the Board of Governors. If the Board of Governors will not protect the members of the staff from such abusive conduct by a fellow professional, who will? Appellant cites the case of *Rosner* v. *Eden Township District Hospital*, 25 Cal. Rptr. 551, 375 P.2d 431 (1962) and *McElhinney* v. *William Booth Memorial Hospital*, 554 S.W.2d 216 (1976). Both cases are readily distinguishable from the matters presented in this case. In both those cases the doctors on the medical staff were seeking to have one of their fellows removed, particularly because of professional criticism. This is not the case here. Where a Doctor on the staff will not accord his fellow doctors and other staff members the minimum standard of human courtesy and respect which they are entitled to by virtue of their positions and where this affects the efficient operation of the hospital

the governing board is justified, if not required, to step in and remove that doctor. To be sure, such action is not to be taken lightly, and petty personality conflicts are not to be magnified out of proportion but whether a problem is a personality clash or serious administrative difficulty, is to be decided by the Board and if the Board finds it necessary to act, the courts will not set aside that decision if the record discloses it is supported by reliable evidence.

The record demonstrates there were other grounds which were considered on the issue of reappointment to the staff, e.g. the refusal to do emergency room duty. We note that Dr. Lustgarten presented evidence to justify her refusal but it was for the Board to determine the sufficiency of that justification. The record disclosed that Dr. Lustgarten engaged in the altering of medical records, specifically the use of some sort of correcting fluid to change a hospital record. Such conduct violates the well-established medical procedure. There was the matter of Dr. Lustgarten's residence in the maternity ward when her house burned down which jeopardized the hospital's certification. It should be noted that here again Dr. Lustgarten presented evidence to justify her behavior. As noted before, the hearing lasted several days and the transcript was hundreds of pages long. We shall not attempt to consider all of the matters raised. We find, however, that a reading of the record demonstrates there was sufficient probative evidence to justify the decision of the Board. Assignment of Error No. 3 is therefore overruled.

Appellant's Assignment of Error No. 4 is as follows:

> *"The trial court erred in affirming the decision of the Board."*

The standards to be used in an appeal from an Administrative Agency are clearly set out in *Andrews* v. *Board*

of Liquor Control, supra, where it states that the court must appraise all evidence as to the credibility of witnesses, probative character of the evidence and the weight to be given from it and if from such consideration it finds that the Board's order is supported by reliable, probative and substantial evidence the court shall affirm the order. Our review of the transcript of the hearing indicates that there is in fact such reliable, probative and substantive evidence to justify, if not compel, the Court of Common Pleas to confirm the order of the Board. Assignment of Error 4 is overruled.

This court affirms the decision of the Court of Common Pleas.

JUDGMENT AFFIRMED

Abele, P. J. & Stephenson, J. concur.

COURT OF APPEALS, HIGHLAND COUNTY, OHIO

Case No. 334

BARBARA LUSTGARTEN, M.D.,
Plaintiff-Appellant,

vs.

FRANK C. BAKER, ADMINISTRATOR, ET AL.,
Defendant-Appellee.

JOURNAL ENTRY

Judgment of Affirmance

(Filed December 5, 1977)

Upon consideration of the record and assignments of error on this appeal on questions of law, the court fails to find any error on the record prejudicial to the rights of appellant in the judgment and proceedings in the court below and the judgment is therefore affirmed, at appellant's costs.

It is ordered that a mandate issue to the court below for enforcement of the judgment. The court certifies, however, that reasonable grounds existed for this appeal.

/s/ HARRY E. ADELE
Presiding Judge

APPROVED:

/s/ ROBERT E. MANLEY
Counsel for Appellant

/s/ FREDERICK J. BUCKLEY, per JAMES S. MILLER
Counsel for Appellee

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,)
)
City of Columbus.)

1978 TERM
To wit:
March 17, 1978

No. 78-18

BARBARA LUSTGARTEN,
Appellant,

vs.

FRANK C. BAKER, ADMR., ET AL.,
Appellees.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS for Highland County TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled. O'Neill, C. J., not participating.

COSTS:

Motion Fee, $20.00, paid by Robert E. Manley.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this day of 19

Clerk

Deputy

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,)	1978 TERM
)	To wit:
City of Columbus.)	March 17, 1978

No. 78-18

BARBARA LUSTGARTEN,
Appellant,

vs.

FRANK C. BAKER, ADMR., ET AL.,
Appellees.

APPEAL FROM THE COURT OF APPEALS
for Highland County

This cause, here on appeal as of right from the Court of Appeals for Highland County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Highland County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this . . . day of . . . . . 19 . . .

. . . . . Clerk

. . . . . Deputy